

Office of Chief Counsel  
Internal Revenue Service

**memorandum**

CC:WR:SWD:PNX:TL-2938-00  
MKLee-Martinez 7L-N-2938-00

date: August 21, 2000

to: Chief, Examination Division, Southwest District  
Attn: Patricia Sturgis, Group Manager

from: District Counsel, Southwest District, Phoenix

subject: Ratification of Form 872

SSN: [REDACTED]

DISCLOSURE STATEMENT

This advice constitutes return information subject to I.R.C. § 6103. This advice contains confidential information subject to attorney-client and deliberative process privileges and if prepared in contemplation of litigation, subject to the attorney work product privilege. Accordingly, the Collection, Examination or Appeals recipient of this document may provide it only to those persons whose official tax administration duties with respect to this case require such disclosure. In no event may this document be provided to Collection, Examination, Appeals, or other persons beyond those specifically indicated in this statement. This advice may not be disclosed to taxpayers or their representatives.

This advice is not binding on Collection, Examination or Appeals and is not a final case determination. Such advice is advisory and does not resolve Service position on an issue or provide the basis for closing a case. The determination of the Service in the case is to be made through the exercise of the independent judgment of the office with jurisdiction over the case.

You have asked our office to provide you with an opinion as to the validity of Forms 872 signed by [REDACTED] attorney, on behalf of [REDACTED] for the [REDACTED] and [REDACTED] tax years. [REDACTED] represents the [REDACTED] in tax matters with the Service for those years.

**QUESTION**

Whether the taxpayers' attorney validly extended the statute of limitations when he signed Forms 872, without a power of attorney filed with the IRS, for the taxpayers' [REDACTED] and [REDACTED] tax years.

**CONCLUSION**

For its protection, the Service would like to have a Power of Attorney from the taxpayers evidencing their authorization of [REDACTED]'s extension of the statute of limitations for the [REDACTED] and [REDACTED] tax years. However, the Service does not have to have a Power of Attorney in order for the statute extensions executed by the taxpayers' attorney to be valid. The taxpayers have indicated in writing<sup>1</sup> that they authorized [REDACTED] to act on their behalf with regards to their taxable years [REDACTED] and [REDACTED]. Such authorization included [REDACTED]'s extension of the statute of limitations for those years. Therefore, the Service should proceed as if those statute extensions are valid. However, you should make sure that the [REDACTED] ratification letter is in the file in the event the taxpayers later claim that the two statutes of limitations were not validly extended.

**FACTS**

The taxpayers' attorney, [REDACTED], executed on behalf of his clients, the [REDACTED], a Form 872 for each of the tax years [REDACTED] and [REDACTED]. The taxpayers are a married couple. At the time that [REDACTED] and the Service executed the Forms 872, both [REDACTED] and the Service thought he had a power of attorney (Form 2848) filed with the Service for the [REDACTED] and [REDACTED] tax years. The Service had several other Forms 2848 for [REDACTED] from the [REDACTED] covering the taxpayers' other tax years. [REDACTED] states in his [REDACTED] letter that he represented the [REDACTED] at the time the Forms 872 were executed and he continues to represent them.

After the statutes expired, [REDACTED] realized he did not have Forms 2848 for the [REDACTED] and [REDACTED] tax years. [REDACTED] sent the District his [REDACTED] letter in which he stated that he signed the Forms 872 with his clients' consent. In that

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<sup>1</sup> [REDACTED] "acknowledged and ratified" [REDACTED]'s actions by signing [REDACTED]'s [REDACTED] letter in which [REDACTED] recounted for [REDACTED], Group Manager, his actions and authority to sign the [REDACTED] and [REDACTED] Forms 872.

letter, [REDACTED] said he had talked to [REDACTED] about extending the statutes prior to signing the Forms 872. Both [REDACTED] signed the letter [REDACTED] sent to the Service stating that they "acknowledged and ratified" [REDACTED]'s statements in the letter.

#### LEGAL ANALYSIS

The Internal Revenue Code ("Code") and its regulations do not require a Form 2848 or other power of attorney as part of its requirement that the Secretary and the taxpayer consent in writing to extend the statute of limitations. I.R.C. § 6501. Section 6501 merely requires that the Secretary and the taxpayer must consent in writing to extend the statute of limitations for assessment, as long as, such agreement is made prior to the expiration of the statute of limitations.

(4) EXTENSION BY AGREEMENT.---

(A) IN GENERAL.---Where before the expiration of the time prescribed in this section for the assessment of any tax imposed by this title...both the Secretary and the taxpayer have consented in writing to its assessment after such time, the tax may be assessed at any time prior to the expiration of the period agreed upon.

I.R.C. § 6501(c)(4).

The issue becomes whether [REDACTED]'s signature constituted the taxpayers' "consent" as referred to in I.R.C. § 6501. The Service's own Procedural Rules require a power of attorney for consents to extend the statutory period for assessment or collection of a tax. Subpart E--Conference and Practice Requirements of the Service's Procedural Rules requires the Service to use a power of attorney in order for a taxpayer's representative to extend the statute of limitations:

(a) Situations in which a power of attorney is required.<sup>1</sup>(1) Requirement of power of attorney. Except as otherwise provided...a power of attorney is required by the Internal Revenue Service when the taxpayer wishes to authorize a recognized representative to perform one or more of the following acts on behalf of the taxpayer...

(3) Consent. Execution of a consent to extend the statutory period for assessment or collection of a tax.

Statement of Procedural Rules § 601.504(a)(3).

However, the Tax Court has stated that the Service's Statement of Procedural Rules does not have the force and effect of law. Lyon v. Commissioner, T.C. Memo. 1994-351, 68 TCM 226; See also Bellis v. Commissioner, T.C. Memo. 1994-28, 67 TCM 2016<sup>2</sup>. The Tax Court has also determined that an attorney acting on behalf of his client without a Power of Attorney can validly extend the statute of limitations. The attorney must be acting on behalf of his client and have the client's authorization to act on his behalf with respect to the tax matter. Lyon v. Commissioner, T.C. Memo. 1994-351, 68 TCM 227. The Lyon Court specifically stated that the "Form 2848 merely formalized for the benefit of respondent the authority petitioner had given" his representative to handle all tax matters for the period at issue. *Id.* Therefore, in the [REDACTED] case the Service does not have to have a Form 2848 Power of Attorney or other Power of Attorney for [REDACTED] to enter into a valid agreement with the Service extending the statute of limitations for [REDACTED] and [REDACTED].

Additionally, the Tax Court in Bellis stated that "[a] consent to extend the period of limitations on assessment and collection is not a contract, but a unilateral waiver of the taxpayer's defense on such ground." Bellis, T.C. Memo. 1994-28; 67 TCM 2015. The Bellis court went on to say that "...[s]everal cases involving this issue have stated the basic proposition that it is the objective manifestation of mutual assent as evidenced by the parties' overt acts, not their secret intentions, that determines whether the parties have made an agreement." *Id.*

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<sup>2</sup>The Tax Court in Bellis v. Commissioner, T.C. Memo. 1994-28 and Lyon v. Commissioner, T.C. Memo. 1994-351 referred to the Statement of Procedural Rules prior to its amendment in 1991 which is essentially the same as the current rule cited here and which read as follows:

(c) Requirements for filing power of attorney or a tax information authorization---(1) Requirement of power of attorney. Except as otherwise provided...a power of attorney in proper form, or a copy thereof...executed by the taxpayer, will be required in a matter by the Revenue Service when the taxpayer's representative desires to perform one or more of the following acts on behalf of the taxpayer...(iii) Execution of a consent to extend the statutory period for assessment for collection of a tax.

Statement of Procedural Rules § 601.502(c)(1)(iii).

The District's and the [REDACTED] overt acts certainly indicate that both parties intended to extend the two statutes of limitations for the [REDACTED] and [REDACTED] tax years. The District's representative signed the Forms 872 on behalf of the Service and the [REDACTED] have "acknowledged and ratified" [REDACTED]'s signing of those Forms 872 on their behalf.

[REDACTED] states in his [REDACTED] letter that he was the [REDACTED] authorized representative for their [REDACTED] and [REDACTED] tax years when he signed the Forms 872 as their representative:

I represented, and continue to represent, [REDACTED] with respect to their [REDACTED] and [REDACTED] tax years in a variety of contexts, including Competent Authority requests and settlement of their income tax disputes with the IRS. Although I did not have a Form 2848 on file with the Service, I was authorized as an attorney for the [REDACTED] to act on their behalf when I executed the above Forms 872 on [REDACTED]. The execution of these Forms 872 was discussed with [REDACTED] and [REDACTED] prior to their execution by me.

By acknowledging and ratifying [REDACTED]'s actions related in his [REDACTED] letter, the [REDACTED] have stated in writing that they gave [REDACTED] authority to sign the Forms 872 extending the statute of limitations for the [REDACTED] and [REDACTED] tax years. Such written statements surely rise to the level of an "objective manifestation of mutual assent" as described in the Bellis case. The [REDACTED] have clearly indicated that they want the statute extensions for [REDACTED] and [REDACTED] to be valid.

If the [REDACTED] should later change their position on the validity of the statute extensions, the Service can make the argument in a court of law that it has an extension in writing, as required by I.R.C. § 6501(c)(4). [REDACTED]'s letter with the [REDACTED] "acknowledgment and ratification" gives the Service a strong argument that the statute extensions are valid. Therefore, it is our opinion that the Service can rely upon the Forms 872 statute extensions signed by [REDACTED] for the [REDACTED] and [REDACTED] tax years.

Nonetheless, you should be very careful to retain in the [REDACTED] and [REDACTED] administrative files the original letter<sup>3</sup> from [REDACTED] which the [REDACTED] "acknowledged and ratified." The

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<sup>3</sup>We further suggest that you make copies of the original letter so that each administrative file for the tax years [REDACTED] and [REDACTED] has either the original letter or a copy of that letter.

taxpayers could change representatives and decide to disavow [REDACTED]'s statute extensions or they could decide for some other reason to disavow the statute extensions. Our office has [REDACTED]'s original letter in the legal file. Because the letter is very important to your file, we would like to have that letter hand-delivered to your office. Please contact me so that we can arrange to have the letter hand-delivered to you.

We consider this advice to be "significant" case advice that must be reviewed by the Office of Chief Counsel. Therefore, you should not take any action with respect to this advice for ten (10) working days to allow the Assistant Chief Counsel (Administrative Provisions and Judicial Practice) an opportunity to comment on this advice.

If you have any questions, please feel free to contact me at (602) 207-8058.

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MARIKAY LEE-MARTINEZ  
Special Litigation Attorney

cc: Curt Wilson, Assistant Chief Counsel.  
(Administrative Provisions and Judicial Practice)